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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-926

CITY OF PITTSBURGH,

Petitioner,

vs.

PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia corporation, successors to Joseph Horne Co., a Pennsylvania corporation, GIMBEL BROTHERS, INC., a New York corporation, THE MAY DEPARTMENT STORES COMPANY, a New York corporation, and PARKING SERVICE CORPORATION, a Pennsylvania corporation,

Respondents.

RESPONDENTS' REPLY TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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PUBLIC PARKING AUTHORITY OF PITTSBURGH, ASSOCIATED DRY GOODS CORPORATION, a Virginia corporation, successors to Joseph Horne Co., a Pennsylvania corporation, GIMBEL BROTHERS, INC., a New York corporation, THE MAY DEPARTMENT STORES COMPANY, a New York corporation, and PARKING SERVICE CORPORATION, a Pennsylvania corporation,

Respondents.

RESPONDENTS' REPLY TO PETITION OF THE CITY OF PITTSBURGH FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA.

Counter-Questions Involved

1. Should the Supreme Court of the United States grant review of the decision of the Commonwealth Court of Pennsylvania holding respondents exempt from certain taxation under the Constitution and statutes of Pennsylvania where petitioner failed to raise a federal question in a timely manner before the Pennsylvania courts and no federal question was considered or decided at the state level?

2. Is there an impairment of contracts within the meaning of Article I, Section 10 of the United States Constitution where there is no record proof of impairment and no legislative action affecting the contract claimed to have been impaired?

Counter-Statement of the Case

Petitioner, in its effort to obtain review by certiorari, seeks to raise an issue under Article I, Section 10 of the United States Constitution relative to impairment of contracts. This issue is raised here for the first time, never having been considered or determined by any of the Pennsylvania courts in the course of this litigation.[1] Moreover, in an attempt to lend substance to this issue, the petition is replete with assertions of fact and assumptions, none of which are of record or supported by any evidence, and most of which are without foundation in fact.

Contrary to the first sentence on page 6 of the petition, this case does not involve the validity of the Pittsburgh Parking Tax Ordinance as petitioner erroneously states. The sole issue in this case from its inception is the *exemption from taxation* of respondents under City of Pittsburgh Ordinance No. 704 of 1969, which the Pennsylvania courts upheld in this case in accordance with the Constitution and statutes of Pennsylvania.[2] The validity of Ordinance No. 704 of 1969 was conceded by the parties and unquestioned by the Pennsylvania courts in this litigation.[3] Moreover, the cases cited in footnote 1, page 6 of the petition, not only have no relevance to the issue here

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[1] Petitioner first attempted to raise an issue under Article I, Section 10 of the United States Constitution in its Petition for Reconsideration to the Supreme Court of Pennsylvania which had previously denied its Petition for Allowance of Appeal (A. 3a). On October 31, 1974, the Pennsylvania Supreme Court denied the Petition for Reconsideration for Petition for Allowance of Appeal by *Per Curiam* order (A. 1a).

[2] The General County Assessment Law, Act of May 22, 1933, P.L. 853, 72 P.S. § 5020-204(g); Parking Authority Law, Act of June 5, 1947, P.L. 458, 53 P.S. § 355.

[3] *Cf. Alco Parking Corp. et al v. City of Pittsburgh,* ..... U.S. ..... (1974) wherein this Court upheld the validity of the Pittsburgh Parking Tax Ordinance (Ordinance No. 704 of 1969). No question of exemption under Pennsylvania law was raised in that case.

presented but do not involve the "same or similar parties" as petitioner states.[4]

Ordinance No. 704 of 1969 (hereinafter called "Parking Tax Ordinance") imposed a tax of 20% on the gross receipts of all "operators" of commercial parking lots and garages in the City of Pittsburgh (A. 48a), and was enacted pursuant to the Pennsylvania Local Tax Enabling Act; December 31, 1965, P. L. 1257, *et seq.*, 53 P.S. §6901 *et seq.*, as amended. The Parking Tax Ordinance specifically included, in its definition of "operator", the Public Parking Authority of the City of Pittsburgh and included operators on the premises of the Public Parking Authority of the City of Pittsburgh (A. 50a). The Public Parking Authority of the City of Pittsburgh (hereinafter called the "Authority") was created pursuant to the Parking Authority Law, Act of June 5, 1947, P.L. 458,53 P.S. §341 *et seq.* Section 2, 53 P.S. §342 of the Parking Authority Act, *supra,* which clearly states that parking authorities created thereunder are declared to be "public bodies" and, pursuant to Section 6, 53 P.S. §355 of said Act, are to be exempted from any taxes.

Respondents are the Public Parking Authority of the City of Pittsburgh and four business corporations operating parking garages on behalf of the Authority pursuant to certain leases (A. 5a). Respondents brought this action in equity seeking to enjoin the enforcement of the Parking Tax Ordinance as to

[4] Contrary to the assertion of petitioner, Associated Dry Goods Corporation, Gimbel Brothers, Inc., The May Department Stores Company and Public Parking Authority of Pittsburgh, all of whom are respondents herein, were *not* parties to any prior action involving either Ordinance No. 704 of 1969 or any of its predecessors. Furthermore, *William Penn Parking Garage, Inc., et al. v. City of Pittsburgh,* 11 Pa. Cmwlth. 507, 314 A. 2d 322 (1974), allocatur granted Pennsylvania Supreme Court, 3 March Term, 1975, cited in footnote 1, page 6 of the petition, concerns a subsequent parking tax ordinance. (Ordinance No. 30 of 1973, effective April 1, 1973) which, in fact, repeals Ordinance No. 704 of 1969 and imposes the tax directly on the parking customer as opposed to the parking operator.

them and to obtain a refund of all taxes collected pursuant thereto, contending that the parking operations of the Authority are exempt from the tax under the Pennsylvania Constitution, Article VIII, Section 2(a), subsection (iii), Section 6 of the Parking Authority Law, *supra,* footnote 2, and the General County Assessment Law, *supra,* footnote 2. which establish an exemption from taxation of any public property used for public purposes.

At the completion of the pleadings in this case, both petitioner and respondent presented motions for summary judgment. No testimony was taken. The Court of Common Pleas of Allegheny County, sitting *en banc,* granted respondents' motion for summary judgment, with a written opinion and order by Judge Silvestri Silvestri (A. 11a-25a).

The Commonwealth Court of Pennsylvania unanimously affirmed the Order of the Court of Common Pleas of Allegheny County (A. 5a). Pursuant to the Appellate Court Jurisdiction Act of 1970,[5] allowing appeal at the discretion of the Pennsylvania Supreme Court, the Pennsylvania Supreme Court denied petitioner's application, *per curiam,* without discussion. *City of Pittsburgh v. Public Parking Authority of Pittsburgh,* 11 Pa. Cmwlth. 442 (1974), allocatur denied ..... Pa. ....., ... A. 2d ..... (1974) (A. 3a).

Upon petition for reconsideration, which for the first time attempted to interject into the case the impairment of contracts issue under the United States Constitution, the Pennsylvania Supreme Court denied reconsideration again without discussion (A. 1a).

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[5] Act of July 31, 1970, P.L. 673, 17 P.S. §211.204.

ARGUMENT

This Court should not review the decision of the Commonwealth Court of Pennsylvania holding that the Parking Authority of the City of Pittsburgh and its lessees are exempt under Pennsylvania law from the imposition of municipal taxes upon their property being used for public purposes.

A. Petitioner's failure to raise in a timely manner any issue under Article I, Section 10 of the United States Constitution in the Pennsylvania courts precludes review of that issue in the United States Supreme Court.

It is beyond dispute on the record of this case that petitioner sought to introduce a federal question into this litigation only after receiving an adverse decision of the Commonwealth Court of Pennsylvania. It is obvious from the unanimous opinion of the Commonwealth Court in favor of respondents that the sole issue before it, as it was in the trial court, was respondents' exemption, under Pennsylvania law, from taxation under the Parking Tax Ordinance (A. 4a-10a; 11a-24a). Even in its Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, petitioner made no direct reference to an issue arising under the Federal Constitution. For the first time, in its Petition for Reconsideration of Petition for Allowance of Appeal, petitioner requested the Pennsylvania Supreme Court, *inter alia,* to review the decision of the Commonwealth Court as a violation of Article I, Section 10 of the United States Constitution.[6] The Supreme Court

[6] While not part of the record herein, the pertinent part of said Petition for Reconsideration reads as follows:

"D. If, as this Honorable Court held in *Alco v. City of Pittsburgh, supra,* at page 265, the City and the Authority are indistinguishable for Parking Tax purposes, then allowing the court below to overrule *McGillick* retroac-

(Footnote continued on following page)

of Pennsylvania denied reconsideration without discussion (A. 1a). It is the settled law of the Commonwealth of Pennsylvania that issues not raised in the trial court may not be raised subsequently in the Pennsylvania Appellate Courts. *Altman v. Ray*, 435 Pa. 401, 257 A. 2d 583 (1969); *In re Abrams Estate*, 419 Pa. 92, 213 A. 2d 638 (1965); *Kilian v. Allegheny County Distributors*, 409 Pa. 344, 185 A. 2d 517 (1962); *Wynnewood Civic Association v. Board of Adjustment of Lower Merion Twp.*, 406 Pa. 413, 179 A. 2d 649 (1962); *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 126 A. 2d 911 (1956).

This Honorable Court has consistently refused to consider federal questions which were not raised, as required by state practice, before the trial court. See *e.g. Edelman v. California*, 344 U.S. 357 (1953); *Bailey v. Anderson*, 326 U.S. 203 (1945); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936); *Hulbert v. Chicago*, 202 U.S. 275 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1902); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1901). Raising the federal question for the first time in a petition for review by the highest state court or, as was the case herein, in a petition for reconsideration,[7] has been held to be generally insufficient unless the state court actually entertains the petition and expressly decides the question. *Bailey v. Anderson, supra; Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935);

(Footnote continued from preceding page)
tively is also an impairment of the contract made by the City with its bondholders. * * * Accordingly, it violates Article I, Section 10 of the Constitution of the United States to apply *Moon Township* so as to deprive the City's bondholders of proper backing." (Petition for Reconsideration of City of Pittsburgh, Page 9.)

[7] The federal question may not be raised in briefs, petitions or oral arguments before state courts since those papers are not of record before this Court and, therefore, do not establish that the federal question was raised. *Live Oak Ass'n. v. Railroad Commission*, 269 U.S. 354 (1926); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934).

American Surety Co. v. Baldwin, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910).

B. The decision of the Commonwealth Court of Pennsylvania declaring an exemption from the taxation imposed by the Parking Tax Ordinance does not constitute an impairment of contracts within the meaning of Article I, Section 10 of the United States Constitution since that clause of the Constitution relates solely to legislative action.

The Pennsylvania courts, in deciding this case, held that the long-standing tax exemption under Pennsylvania law for public property used for public purposes is valid and applicable to the respondents' parking operations (A. 4a-10a; 11a-25a). In reaching its decision, the Commonwealth Court of Pennsylvania correctly interpreted and applied the statutes[8] and the case law[9] of Pennsylvania to arrive at the conclusion that:

> ". . . public parking authorities, whether self-operated or leased for operation by others, are exempt from all taxes, whether levied upon them as real estate and called property taxes, or imposed upon the transactions by which they are used and called excise taxes" (A. 9a).

Petitioner asserts that the decision below by the Commonwealth Court is contrary to the *McGillick*[10] decision on which it claims reliance in guaranteeing the bonds of the Authority which, according to petitioner, are backed by the full faith and credit of petitioner. Thus, says petitioner, the contractual

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[8] See statutes cited at note 2, *supra*.

[9] *County of Allegheny v. Moon Township*, 436 Pa. 54, 258 A.2d 630 (1969).

[10] *C. A. McGillick et al. v. City of Pittsburgh*, 415 Pa. 581, 203 A.2d 480 (1964) (A.26a-47a) Petitioner erroneously asserts, on page 12 of its petition, that *McGillick* involved the same parties as those before the Pennsylvania courts in the instant case. In fact, none of the respondents participated in the *McGillick* case in 1964. See footnote 11, *infra*, for the Commonwealth Court's discussion of *McGillick* as it relates to this case.

rights of the Authority's and City's bondholders are impaired by the reduction of revenues accruing to petitioner by the exemption of respondents from the parking tax (See Petition, pp. 7, 8, 9, 16, 17 and 22).

First, the impairment of contracts clause of the United States Constitution, Article I, Section 10, has been interpreted to apply only to those impairments of contractual obligations resulting from legislative action. See *e.g. Barrows v. Jackson,* 346 U. S. 249 (1953). In *Barrows,* this Court stated that Article I, Section 10, is directed at legislative action only:

> " 'It has been settled by a long line of decisions, that the provision of Section 10, article 1, of the federal Constitution, protecting the obligation of contracts against state action, *is directed only against impairment by legislation and not by judgment of courts.* ***' Tidal Oil Co. v. Flanagan, 263 U.S. 444, 44 S. Ct. 197, 198, 68 L.Ed. 382" (Emphasis Supplied).

Interestingly, petitioner cites *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924), at page 11 of its petition, in support of a contrary rule. Yet, in that case, the Supreme Court, distinguishing most of the cases upon which petitioner now relies, such as *Gelpeke v. Dubuque,* 68 U.S. (1 Wall.) 175 (1863); *Douglass v. County of Pike,* 101 U.S. (11 Otto) 677 (1879); and *Rowan v. Runnels,* 46 U.S. (5 How.) 134 (1847), attempts to correct the "persistent error" relative to Article I, Section 10. The Supreme Court explained as follows:

> "These cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a state prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different states

held themselves free to decide what the state law was, and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on article 1, section 10, of the federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third article of the federal Constitution they were empowered to do. Burges v. Seligman, 107 U.S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law, but, where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was. *Had such cases been decided by the state courts however, and had it been attempted to bring them here by writ of error to the state Supreme Court, they would have presented no federal question, and this court must have dismissed the writs for lack both of power and jurisdiction.* This is well illustrated by the case of Gelpeke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520, and Railroad Co. v. McClure, 10 Wall. 511, 19 L. Ed. 997. In the former, bonds sued on in the Circuit Court of the United States, were collected under judgment of this court. In the latter, like bonds sued on in a state court were held invalid, and a writ of error to the state Supreme Court was dismissed.

"Other cases cited are Louisiana v. Pilsbury, 105 U. S. 278, 26 L.Ed.1090, and Muhlker v. New York & Harlem R.R. Co., 197 U.S. 544, 25 Sup. Ct. 522, 49 L.Ed. 872, *but in each of them a statute had been passed subsequently* to the contract involved and was held to impair it. In such a case this court accepts the meaning put upon the impairing statute by the state court as authoritative, *but it is the statute as enforced by the state through its courts which impairs the contract, not the judgment of the court*" (Emphasis Supplied). *Tidal Oil Co. v. Flanagan, supra* at 452, 453.

Thus, even if the ruling in *McGillick* could be construed as a holding rather than dicta, it is clear that no impairment

of contracts would exist by the mere reversal of that decision ten years later. The fact is, however, that *County of Allegheny v. Moon Township, supra,* footnote 2, decided in 1969, five years after *McGillick* and which *preceded the enactment of the Parking Tax Ordinance now under consideration,* is directly contrary to the principle for which *McGillick* is cited by petitioner, and is directly on point with regard to the Pennsylvania exemption from taxation of public property used for public purposes.[11] Under these circumstances, there is no substance at all to the belated contentions of petitioner based on Article I, Section 10 of the United States Constitution.

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[11] With respect to the weight to be given to the *McGillick* decision and its *per curiam* affirmance by the Pennsylvania Supreme Court in that case, the Commonwealth Court below stated:

> "The plaintiffs in that case, owners or operators of commercial lots, contended that the ordinance violated the standard of uniformity compelled by Article 9, section 1 of the Pennsylvania Constitution by excluding operators of hotel, tourist court, and trailer park parking lots, and the city and its Parking Authority. After expressing its opinion that the uniformity clause was offended by the 'flat exemption' of the Authority, the county court observed: 'It should be noted that the Parking Authority Law provides that "any property" acquired or used by the Authority for its purpose is exempt from any taxes. We are of the opinion that this does not exempt taxes upon parking transactions which under this ordinance are in the nature of excise taxes as contrasted to property taxes.' The city contends that the affirmance per curiam of the order which accompanied this opinion constituted a holding by the Supreme Court that section 15 of the Public Parking Authority Law provides no exemption from a tax on parking transactions. There are several reasons for disagreeing: first, the sentences relied on were dicta in the lower court's opinion; second, the affirmance by the Supreme Court of the Allegheny County Court's *order* cannot be taken as approval by the former of every statement of law propounded by the latter in support of the order; and, finally, *McGillick* preceded by five years *Allegheny County v. Moon,* which latter case is on point and in direct contradiction of the principle for which the former is cited" (A. 9a, 10a).

Second, there is no evidence to support petitioner's principal contention that it in some manner relied upon the *McGillick* decision in making certain financial decisions. The *McGillick* decision stated nothing more than it was a violation of the uniformity clause of the Pennsylvania Constitution to exclude the Public Parking Authority from the *coverage* of a predecessor parking tax ordinance (A. 26a), but did not even purport to decide the issue of exemption from taxation of public property used for public purposes. For the petitioner to now claim that it relied upon the *per curiam* affirmance of the trial court decision in *McGillick*, aside from its lack of record support, is incredulous. Moreover, there is nothing in the record supporting or tending to demonstrate impairment of petitioner's ability to meet obligations to bondholders.

The total lack of factual support for petitioner's assertions in this case is further found in petitioner's statement at pp. 7, 8 and 22 of the Petition, wherein petitioner asserts that the Authority bonds are guaranteed by the full faith and credit of the City of Pittsburgh, which is the basic premise of petitioner's argument. This assertion is not only unsupported by the record, but is untrue. For example, petitioner, in making this contention, is well aware of specific language in the prospectus for the Parking Authority bond issue for the construction of the May Department Store garage, one of the Respondents here, which reads as follows:

> "Neither the credit nor the taxing power of the City of Pittsburgh or the Commonwealth of Pennsylvania or of any political subdivision thereof will be pledged for the payment of the principal, interest or premium (if any) on the Bonds. The Bonds will not constitute obligations of the City of Pittsburgh or of the Commonwealth of Pennsylvania or of any political subdivision thereof, and neither said City nor said Commonwealth nor any political subdivision thereof will be liable for the pay-

ment of principal, interest or premium (if any) payable upon the redemption of, the Bonds."

Likewise, the assertions set forth on pp. 8 and 9 of the petition, with reference to the use of parking meter funds as well as the inferences and assumptions drawn therefrom, have no foundation anywhere in the record of this case, the purpose and uses of parking meter funds not having been presented to nor considered by the Pennsylvania courts. The same is true of petitioner's statements relative to the deduction of the parking tax from rentals on pages 8 and 9 of the petition. These misleading and inaccurate, as well as unsupported, assertions ignore, for example, the flat rental required under the leases for debt service without any deductions (R. 56a-63a); 105a-109a; 141a-149a; 173a-175a; 217a).

Finally, there is no evidence in the record to support the bald misstatements of petitioner that respondents (1) received "favorable treatment", (2) had "lucrative business arrangements", (3) secured rates fixed at levels sufficient to pass on the parking tax to patrons, or (4) are the recipients of a "windfall". Since no evidence appears in the record in support of these gratuitious and pejorative statements, respondents must conclude that they are designed merely to appeal to emotion and require no direct response.

Conclusion.

Based on the foregoing reasons, it is respectfully requested that this Court deny the petition of the City of Pittsburgh for the issuance of a writ of certiorari to review the decision and order of the Commonwealth Court of Pennsylvania.

Respectfully submitted,

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